88-512

NO. 88-5112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN,

Petitioner,

v.

TYRIS LEMONT HARVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

WHETHER THE RECORD BELOW IS ADEQUATE FOR THIS COURT TO DETERMINE IF A STATEMENT OBTAINED IN VIOLATION OF BOTH MIRANDA v ARIZONA AND THE SIXTH AMENDMENT WAS TRULY VOLUNTARY AND APPROPRIATELY USED TO IMPEACH RESPONDENT.

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PUBLISHER'S NOTE:

PAGE NUMBER(S) 3 COULD NOT BE LOCATED.

COUNTERSTATEMENT OF THE CASE

Respondent Tyris Lemont Harvey was arraigned on charges contained in the criminal complaint on July 2, 1986. A $20,000 cash bond was set. Respondent, an indigent person, was remanded to the Wayne County Jail where he remained incarcerated throughout the pendency of the proceedings. An attorney was appointed by the court to represent Respondent and on July 10, 1986, Respondent, with appointed counsel, waived his statutory right to a preliminary examination. He was bound over for trial.

Although Respondent's bond was later reduced to $20,000-10%, he remained in custody. His non-jury trial commenced September 15, 1986.

Contrary to the per curiam, unpublished opinion of the Michigan Court of Appeals, five (5) witnesses testified at the trial. These included the complainant and Respondent.

The complainant explained that she knew Respondent for three or four months before the alleged offense. (35, 36) She met him when a neighbor brought him to her home to borrow the pipe she uses to smoke crack cocaine. (36, 37) The complainant smokes crack cocaine one or two times a week, but testified she did not use drugs that day. (32) The complainant testified she was sexually assaulted by Respondent. (26) She reported the incident to the police approximately two days later. (28, 29)

Respondent testified that he went to the complainant's home about 9:00 p.m. (97) They smoked cocaine and he later asked if she would exchange sexual favors for more cocaine. (98, 99) He went with the complainant's sister to get more cocaine. (99) The complainant did not provide the sexual favors, they argued and fought. (99, 100) Respondent denied any sexual act. (108)

During cross-examination, the prosecutor utilized a statement made by Respondent to the police on July 2, 1986 in an effort to impeach Respondent. (110, 112) Then the prosecutor utilized a statement apparently made by Respondent to a police officer during the week before trial. (116-121) Contrary to the Michigan Court of Appeals opinion, the trial record does not indicate that Respondent signed a constitutional rights waiver form nor does it indicate that Respondent initialed any rights on such a form. The prosecutor conceded a Miranda violation. (116) No testimony was offered concerning any of the circumstances surrounding the taking of the statement other than the fact it was made and Respondent made it because he felt he was not guilty of the crime. (116) The only impeachment concerned the dollar amount of cocaine ($30, $50 or $80) (116-119), whether Respondent remembered the name of another man who had also gone to buy cocaine and Respondent's omission in the September 9, 1986 statement that the other man had purchased his own cocaine. (119-121)

REASONS FOR DENYING THE WRIT

The trial record is insufficient for this Court to review the question as framed by Petitioner. This is not a case where the use of a statement taken in violation of Miranda v Arizona, 384 US 436, 86 S Ct 1602; 16 L Ed 2d 694 (1966), and the Sixth Amendment was necessary to prevent those constitutional violations from being perverted into a license for perjury as in Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). Respondent did not make a confession and then take the witness stand asserting innocence. The impeachment related primarily to an omission.

The trial record is silent concerning when Respondent's court appointed counsel first became aware that his incarcerated client made a second statement to the police a mere six days before trial and two months after counsel was appointed by the court. The trial prosecutor characterized the circumstances about the statement in this manner:

> MS. HICKEY: Why? Your Honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.
>
> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. And, I did advise counsel of that. There is no indication that it was involuntary and under Harris vs New York, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (116, 117)

When the trial court inquired if there was an objection,

Respondent's counsel replied:

> MR. WELTON: Yes, I do have objections, if she is going to use it, as long as she is going to use it not for substantive evidence. If she is going to use it for the proper purpose, well, I want to know how she is going to use it for the proper purpose. (117)

The prosecutor then used the statement briefly for impeachment. It is unclear what Respondent's counsel considered "the proper purpose". What is clear, however, is that the taking of the statement was in contravention of both Miranda and Sixth Amendment. And Respondent respectfully suggests that it would be unfair to presume that the statement was purely voluntary. Respondent's counsel did not challenge the characterization by the prosecutor.[1] No effort was made to make any inquiry at all concerning circumstances revolving around the taking of the statement. The record is almost completely barren of facts concerning the full extent of the police officer's conduct, the Respondent's physical condition, level of intelligence or mental condition. The prosecutor's comment that the police officer allegedly told Respondent he didn't need to talk to his lawyer, clearly raises the specter of involuntariness.

Respondent respectfully submits that in order for this Court to effectively balance the "incremental deterrence of police illegality against the strong policy against countenancing perjury"[2], there should be a trial record or evidentiary hearing record with a full exposition of facts conducive to such an important and difficult task. Here there was not.

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[1]This critical failure by appointed counsel may have been because, as the Michigan Court of Appeals concluded, "he apparently believed that the second statement was identical to defendant's trial testimony..."

[2]New Jersey v Portash, 440 US 450, 458; 99 S Ct 1292; 59 L Ed 2d 501 (1979)

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 15, 1989

RMM-828/edd